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MAY 17 1982
ALEXANDER L. STEVAS,
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No. 81-2126

In the Supreme Court of the United States

OCTOBER TERM, 1981

LARRY FIELDS, Acting Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA,
Petitioners,

vs.

PAUL M.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1982

* See footnote on page -ii- for explanation of the parties.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal district court should require the re-exhaustion of state remedies when a petitioner brings a claim for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 that has been presented to, and rejected by, the state courts, but during the course of litigation of the Section 2254 claim, and almost two (2) years prior to any hearings thereon, the state courts overrule prior case law that had barred petitioner's claims before the state courts and establish state procedures for addressing such claims before the state courts through Oklahoma's Post-Conviction Procedure Act.

2. Whether the finding by the federal District Court and Court of Appeals that a state prisoner's voluntary statement was made in absence of an informed waiver of that prisoner's right to remain silent when the prisoner, who was within five (5) days of becoming eighteen (18) years old when he was questioned, had been read his *Miranda* warnings, was interrogated by the police at a police station in the presence of the prisoner's mother during daytime hours, and was not subjected to unreasonably prolonged, abusive or threatening questioning by the police representatives, was contrary to legal principles established by this Court for evaluating such statements and clearly erroneous as a matter of fact based upon the record and therefore appropriate for review by this Court as an exercise of its supervisory powers over the inferior federal courts.

3. Whether a voluntary statement made to police representatives that was made in absence of an informed waiver of the declarant's right to remain silent is constitutionally barred from use as State's evidence at a hearing held for the sole purpose of determining whether or not the jurisdiction of the juvenile division of the District Court

should be transferred to the adult division of that court for prosecution of criminal charges against this person.

4. Whether a voluntary statement made to police representatives in absence of an informed waiver of the declarant's right to remain silent is constitutionally barred from use as State's evidence at a hearing held ten (10) years after the declarant had entered a counselled, knowing and voluntary plea of guilty to the crime of murder, the sole purpose of said hearing being to determine whether or not the jurisdiction of the juvenile division of an Oklahoma District Court would have been transferred to the adult division of that court.

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*Paul M. is a person who pled guilty to the charge of Murder and was sentenced to serve life imprisonment. Counsel for Mr. M. informs your Petitioners that if this Court does not grant relief to Petitioners, Mr. M. intends to seek to have all records of his conviction expunged from the records of this Court. Petitioners believe they bring important, meritorious claims in this petition but recognize the discretion of this Court in entertaining even important, meritorious claims. Accordingly, Petitioners will only refer to your Respondent as "Mr. M." in order to save this Court from a motion for expungement by Mr. M. at some later date. This should in no manner be taken as a concession by these Petitioners that Paul M. should properly have been treated as a juvenile in reference to this murder.

Mr. M. originally brought his petition for habeas corpus against Richard Crisp, who was at that time Warden of the Oklahoma State Penitentiary, wherein Paul M. was incarcerated. In the course of the litigation, Mr. M. was eventually transferred to another facility. Mr. M. was released from state custody on March 25, 1981, upon the writ of habeas corpus directed to the Warden of Oklahoma's Joseph Harp Correctional Center. The Acting Warden of that institution is Larry Fields. See Rule 25, F.R.Civ.P., 28 U.S.C.A.. The State of Oklahoma is one of several sovereign states forming the Federal Union whose judgment and sentence was vacated by the courts below. Your Petitioners will be referred to collectively as "the State" herein.

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No. .....

In the
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LARRY FIELDS, Acting Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA,
Petitioners,

vs.

PAUL M.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and that court's opinion on rehearing are published *sub nom., Crisp* v. [*M*], 668 F.2d 1127 (10th Cir. 1981), *reh. denied,* 668 F.2d 1136 (1982).

JURISDICTION

Judgment in accordance with the opinion of the Court of Appeals was entered on September 29, 1981. A timely petition for rehearing was filed and final judgment of the Court of Appeals was entered in accordance with the court's opinion on rehearing on February 16, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21.1(f), Revised Rules of the Supreme Court of the United States, the constitutional and statutory provisions involved are set forth verbatim in Appendix A to this petition. The constitutional and statutory provisions involved are as follows:

U.S. Const. amend. V
U.S. Const. amend. XIV, § 1

28 U.S.C. § 1254
28 U.S.C. § 2254

10 O.S. Supp. 1970, § 1101(a), (d), (e), (f)
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22 O.S. Supp. 1970, § 1051
22 O.S. Supp. 1969, § 1076
22 O.S. 1971, § 1080
22 O.S. 1971, § 1081
22 O.S. 1971, § 1086

STATEMENT OF THE CASE

On October 22, 1970, the State of Oklahoma, acting through the District Attorney for Oklahoma County, Oklahoma, filed a felony Information against Paul M. and one Earl Van Denton, charging, among other facts, that on October 1, 1970, within the County of Oklahoma County, Mr. M. and Van Denton committed the crime of Murder by beating one Willie Droke about the head and face with a telephone receiver. On April 13, 1971, Paul M. appeared with counsel in the District Court for Oklahoma County, withdrew his previous plea of not guilty and knowingly and voluntarily pled guilty to that crime. In entering the plea Mr. M. was asked if it was entered of his own free will and Paul M. reportedly replied:

> "Yes, but we did it with a tire tool instead of a telephone receiver." (Deposition of Theus, [*M*] v. *Crisp*, E.D. Okl. No. 75-249-C, filed July 14, 1980).

See also, Appendix G, Plea of Guilty: Summary of Facts, *State* v. [*M*], No. CRF-70-3097 (D.C. Okl.Co.), ¶ 12.

Mr. M.'s plea was accepted by the trial court and, as a consequence of the plea, Mr. M. was sentenced on that date to Life Imprisonment. Mr. M. did not exercise his statutory right to appeal the conviction on his guilty plea. See 22 O.S. Supp. 1970, § 1051. See also 22 O.S. Supp. 1969, § 1076.

Prior to the entry of the plea, Mr. M. was questioned by the police on November 5, 1970, after having been brought back from California. Present at the questioning session, commencing at 10:35 a.m., were Paul M., M.'s mother, hereinafter referred to as "May M.," and two police officers, Messrs. Richard Mullins and Bill Baldwin. Prior

to the commencement of questioning, Mr. M. executed an "Interrogation; Advice of Rights" form. (Reproduced as Appendix E hereof.) An oral conversation then ensued between Paul M. and the policemen in the presence of May M. At about 1:00 p.m. a typist was brought in and the question/answer session that followed was simultaneously recorded by a typist. (Reproduced at length as Appendix F.) Paul M. told the police:

> "Q. Mr. [M.], would you explain in your own words, from the beginning reference what actually happened?
>
> "A. At first me and willie rented the motel room, at the Alamo Plaza motel, and we went over there and had a few drinks of beer and vodka, and they gave me some kind of marijuana and put some white powder in my beer. We went and picked up Earl Van Denton at his house, in Willie Droke's car. We went and took Earl back to the motel and started drinking beer, vodka too. Then I passed out about an hour after I was over there. Him and Willie Droke were having some kind of sex affair, and I had passed out, WILLIE and EARL left, Willie came back to the motel and woke me up, and told me that he and Earl hadhad sex together. Then we got up out of bed and he took me home, and thensaid that he had to go to work.
>
> "He asked me to meet him at about 6:30pm that night, at my house. He had another kid in the car by the name of Daniel, and then we went back over to the Alamo Plaza Motel, and started drinking again. Willie and Daniel were having another sex affair, and then about 10:00p.m. we took Daniel home and went over and picked Earl up. We got to the Alamo Plaza and started drinking again, I don't remember the exact date but it was the last part of September. We had stopped and gotten Beer and fritos before going

back to the motel. We got back over there and Willie Droke gave me some pills, every time I would open a can of beer and take a drink out of it, I'd set it down and go to the restroom and when I'd come back half of it would be gone and it would taste funny. Willie Droke said that he had better not catch my brother Charles out on the streets, because Rocky had told him something about him. Then we started arguing and I hit Willie Droke on the forehead with my fist. I got back up to get a drink and he kicked me and then he hit me with his hand, then Willie got up and grabbed the phone, to call the switchboard, after Earl had hit him with a 7-up bottle approximately 10 times in the head and face, Willie was bleeding, in the back of the head and EARL had hit him with his fist, and Willie's eye was swollen up. Earl tore the telephone XXXXXXXXXXXXXXXXXXXXXX causing the wire to be disconnected. Then Willie and Earl started struggling and Willie's head was bleeding and I had given him a towel to put over his head. Earl told him to get in the car, and we walked out of the motel and Willie was in front, Earl behind Willie and I was behind Earl. Willie walked around and got in and got into the right side of the car into the rear seat with a towel over his head, this was Willie's own car that they got into, which was parked right beside the room at the motel.

"EARL drove the car from the motel, and I was sitting in the front seat, then EARL said let's tie him up, Willie's head was leaning back with a towel wrapped around his head. Then we took some road to Blanchard, I had passed out and we were in some kind of a country in Blanchard, and EARL thought that Willie had a gun in the back of the trunk. We parked the car then Earl got out to check to see if Willie had a gun in the trunk, he came back with a tire tool and a shovel. I was sitting inside the car

and willie was still in the back seat. Then Earl put the tire tool in the front floorboard, then he took the tire tool back of the car, and laid the shovel down beside the car took the tire tool aroundon Willie Droke's side and told Willie to get out of the car, and Willie got out of the car and I got out of the car, and when Willie got out of the car he was standing up, Earl hit him with a tire tool in the back of the head about three or four times, knocking him down. It was a single lug tire tool, then Earl, after Willie had fallen down had hit him with the shovel on the back of the head twice. Willie got up and ran around to the driver's side of the car got inside, EARL came around, Willie got back out of the car, he didn't get very far past the back of the car, and Willie had fallen down, then Earl got back in the car and started it up, did about 30 mph making a 'U' turn, and Willie Droke said 'he is going to run over us'. I had step back beside Willie who was laying down, and he stopped the car in front of me and Willie, and Earl got out of the car, took the shovel and hit Willie one time on the side of the head and he was still breathing, being Willie, and I had passed out twice out there, and Earl looked at me as if he were going to hit me with the tire tool. Earl got the shovel and started digging, and I dug some and then Earl started digging grave, pretty well deep, and then we drug his body over to the grave, put him in there and he had a cloth or something over his face, Earl took Willie's shirt, socks, and shoes off, no he did' not take his shirt off, and then started to cover him up. He was still breathing and I told Earl this. After he was covered up he started to get out of the grave, I could see some dirt moving as if he were trying to get out. Earl had took car, and run over the grave about 15 times, and then we drove back to Oklahoma City, Earl drove the car. Before we drove back to Oklahoma City Earl

threw the tire tool and the shovel into what I believed was a pond about 3 blocks from the grave. I was facing north and earl got the tire tool up as if he were going to throw it, I moved out of the way and then he threw it into the pond, it didn't lack much of hitting me. And I thought that he was going to hit me with the tire tool. Earl drove the car back to Oklahoma City, parked it outside on the street at the Alamo Plaza Motel, took the key to the room back into the room, and then we left and got a ride on Agnew from Falvial Moore, this was about 8:00am in the morning. I went home and then they took Earl HOme. Earl kept Willie's camera, and he must have taken his watch and ring.

"I later left Oklahoma City and went to California."

On May 28, 1975, Mr. M., through counsel, filed an application for post-conviction relief pursuant to Oklahoma's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq.* In that application Paul M. stated that he was born on November 10, 1952; that he was therefore only seventeen (17) years of age when the crime was committed; that the law in effect at the time he was convicted, 10 O.S. Supp. 1970, § 1101(a), defined males as juveniles until sixteen (16) years of age while it defined females as juveniles until eighteen (18) years of age and that he was therefore a victim of sex-based discrimination. He contended that the adult division of the District Court would not have had jurisdiction to try him if he had been a female absent his certification for adult trial. Although the record reflects that this was Mr. M's second application for post-conviction relief, Compare 22 O.S. 1971, § 1086, and *Cf. Murch* v. *Mottram,* 409 U.S. 41 (1972), the Court entertained the application on the merits. The Oklahoma Dis-

trict Court denied relief by order dated June 5, 1975. See *State* v. [*M*], (Unpublished) No. CRF-70-3097 (D.C. Okl. Co.) (Reproduced at Appendix H). Mr. M. appealed to the Court of Criminal Appeals for Oklahoma which entered an Order Affirming Denial of Post-Conviction Relief, relying on *Dean* v. *Crisp*, 536 P.2d 961 (Okl.Cr. 1975). *See* [*M*] v. *State* (Unpublished) No. PC-75-352 (Okl.Cr. July 3, 1975) (Reproduced at Appendix H). *Dean* v. *Crisp*, supra, had been decided only two (2) days prior to the date the District Court denied relief.

On September 10, 1975, Paul M., by his attorney, filed a petition requesting, among other things, habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma, alleging an unconstitutional conviction pursuant to *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), and *Radcliff* v. *Anderson*, 509 F.2d 1093 (10th Cir. 1975). Paul M. also alleged exhaustion of the issue at the state level. The case was held in abeyance pursuant to the federal District Court's June 18, 1976 order, until certain appeals by the Court of Appeals for the Tenth Circuit were resolved.

On March 13, 1978, the federal District Court issued a memorandum opinion in the case below, the Honorable Joseph W. Morris presiding. Pursuant to footnote six of *Bromley* v. *Crisp*, 561 F.2d 1351, 1356 (10th Cir. 1977), the State was granted 120 days to secure a state court's determination as to whether Paul M. would have been certified an an adult for state criminal prosecution. [*M*] v. *Crisp*, No. 75-249-C (E.D. Okl. March 13, 1978) (Reproduced at Appendix I).

On May 23, 1978, the District Court of Oklahoma County, State of Oklahoma, entered its Order, upon application filed by the State of Oklahoma requesting a certification hearing, that the court lacked subject matter jurisdiction and that the State of Oklahoma could not unilaterally invoke the jurisdiction of the District Court to review the conviction. The court, therefore, denied the application to set hearing. *State* v. [*M*], No. CRF-70-3097 (Okl.Co.D.C. May 23, 1978) (Reproduced at Appendix J). Paul M. did not attempt to seek a State hearing during this 120-day stay, nor has Mr. M. subsequently sought relief from the State courts.

On June 27, 1978, the State informed the federal District Court of the finding by the state District Court that it no longer had jurisdiction of the matter and the state court's finding that the State had no authority to invoke the jurisdiction of the State District Court regarding this conviction. In view of the procedure announced by the Court of Appeals in *Bromley* v. *Crisp*, supra, the State at the same time requested a hearing before the federal District Court on the certification hearing.

The case was reassigned from the Honorable Joseph Morris, United States District Judge, to the Honorable H. Dale Cook, United States District Judge. On November 30, 1978, Judge Cook gave the State twenty (20) days to show cause why the writ should not issue since a state court determination had not been obtained within the period provided by Judge Morris. (Reproduced at Appendix K.) In response the State re-urged the fact that it was unsuccessful in invoking the state trial court's jurisdiction and again as an alternative to the issuance of the writ requested an

opportunity to prove the certificability of M. before the federal court. (See Appendix K.)

On February 14, 1979, the Court of Criminal Appeals of Oklahoma held that 10 O.S. 1971, § 1101(a), was unconstitutionally discriminatory and denied males between 16 and 18 years of age equal protection. *Edwards* v. *State*, 591 P.2d 313 (Okl.Cr. 1979). The State court then established a procedure, for the first time, to determine through post-conviction application whether retrospective relief should be granted to any individual male who was convicted of a criminal offense following transfer from a juvenile court while he was between 16 and 18 years of age without benefit of a certification hearing. At the same time the court partially overruled *Dean* v. *Crisp*, supra, the case the Oklahoma courts had relied upon in rejecting Paul M's application for post-conviction relief. (See Appendix H, Order Affirming Denial of Post-Conviction Relief, [*M*] v. *State*, No. PC-75-352 [Okl.Cr. 1975].)

On June 25, 1979, the United States District Court for the Eastern District, Honorable H. Dale Cook, issued its Order setting a hearing on the issue of certification, together with a hearing regarding an alleged bad faith effort by respondents to comply with the court's Order of March 13, 1978. Paul M. had alleged in substance that counsel for the State had not tried hard enough to get a state certification proceeding heard in the District Court of Oklahoma County. Order (unpublished), [*M*] v. *Crisp*, No. 75-249-C (E.D. Okl. June 25, 1979). (Reproduced at Appendix L.) The date originally set for the evidentiary hearing was August 2, 1979. Instead, the court conducted a pre-trial hearing on August 2, 1979. Discovery was then

sought by Mr. M. and two depositions were taken and filed. In the course of Mr. M.'s discovery efforts, the State on January 24, 1980, sought a protective order wherein it was specifically pointed out to the District Court that the Court of Criminal Appeals of Oklahoma had established through *Edwards* v. *State*, supra, a new procedure whereby Paul M. could and should seek review of the contentions then in front of the federal court. (See Appendix M.) This position was consistent with a letter-report made by the State on August 28, 1979, filed of record September 18, 1979, in which the federal District Court was shown that state convicts with the same claim as Paul M. were filing claims through the State's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq.*, and these claims being entertained by the District Court for Oklahoma County. (Reproduced at Appendix M.) The federal court was further informed in this report that Mr. M. had not filed a post-conviction application and was reminded that the State had no means of invoking the State District Court's jurisdiction. The report went on to state:

> "I am forwarding a copy of this letter to Mr. Gilbert and would reiterate our position in that the Oklahoma Criminal Appeals [*sic*] decision in Edwards v. State, Okl.Cr., 591 P.2d 313 (1979) affords petitioner an opportunity to present to the State District Court some valid reason to believe that certification would have been denied. This remedy was not available at the time this cause commenced. However, it is Respondent's position that Petitioner [M] cannot avail himself of the machinery of this Court until he has exhausted *all* state remedies." (Emphasis in original)

The federal evidentiary hearing was subsequently reset for August 6, 1980, reset for November 3, 1980, and finally

reset and heard in Tulsa, Oklahoma, on November 13, 1980. On page six of the transcript from that proceeding, the court stated:

> "THE COURT: And it seemed to me that we were at a point in this case if we held a certification hearing — and I will say this, I have toyed with the idea of sending it back to state court because clearly now the state has recognized its responsibility and the Court of Criminal Appeals has changed its position. . . . But just to be totally honest with you, and I would be no otherwise, I am concerned whether an objective fair hearing could be held at the district court level in Oklahoma County, occasioned by the conflicts that have existed during this period of ti.. .. And frankly I didn't want to throw Mr. Gilbert back into that situation. I envision the first thing he is going to do is to try to disqualify the judge and try to get it assigned to somebody in there, and I think he has got a right to do that. I am not criticizing him at all, I am just simply saying I would be putting you all and him and his client in an atmosphere of uncertainty, and it just seemed better, orderly judicial business to simply say, okay, we will hold it here. I will do the best I can on it and we will see if we can avoid the legal scramble that has been going on. That is really where we are."

The certification hearing proceeded with the expressed acquiescence of the attorney for the State. The State put on police investigator Richard Mullins, who had been responsible for the inquiry into the homicide of Willie Droke. The testimony showed that Paul M. had been arrested in connection with the homicide and that, in the presence of Mr. M.'s mother, Paul M. was interrogated after being advised of his constitutional rights as a suspect (Tr. 15).

This police interrogation commenced at 10:35 a.m. on November 5, 1970 (Tr. 24). Mr. M. had been returned to the Oklahoma City jail from Los Angeles county jail the previous evening, arriving about midnight (*Id.*). The State then attempted to introduce a copy of an interrogational rights form signed by Mr. M., his mother, another policeman, and Officer Mullins. Mr. M.'s attorney voir dired Officer Mullins regarding the ability of the Officer to determine the literacy of an individual. Upon questioning, it was established that the Officer had read the rights from the paper to Mr. M. and his mother; and upon his asking them if they understood, they told the Officer, "yes" (Tr. 22). This signed interrogational rights form was admitted into evidence (Tr. 33). Further direct examination of the Officer revealed that in his opinion Paul M. appeared to be under no coercive threat that would affect the voluntary nature of statements made (*Id.*).

The State then attempted to offer statements made by Paul M. to Officer Mullins into evidence. The hearing was transformed into a suppression hearing of Mr. M.'s confession. Officer Mullins testified that he and another officer had a verbal conversation in the presence of Mr. M.'s mother prior to reducing Paul M.'s statements to writing (Tr. 38-39). Then in front of a typist the statements were printed on paper. Mr. M. never indicated to the Officer that he had trouble reading or understanding the documents (Tr. 40).

Paul M.'s attorney then called M.'s mother, May, who testified that she and Paul M. were illiterate and not able to understand his rights. On cross-examination by the State, she testified that Mr. M. had been before a juvenile

judge prior to being arrested in the Droke murder (Tr. 58). She testified that she was not threatened by Officer Mullins to sign the rights statement (Tr. 60), and that they read her a statement of rights but she could not understand what they were saying (Tr. 60). She testified that the officers were neither rude nor threatening to Mr. M. (Tr. 61). She confirmed that Paul M. was questioned in her presence (*Id.*). Finally, when asked about her understanding of the right to remain silent, she said "means to keep your mouth shut I guess" (Tr. 62).

Paul M. was then put on the stand by his counsel. He was, at the time of his arrest, a seventh grade dropout who could only read "just a little" (Tr. 64). He stated that he did not know what a lawyer was at age seventeen. He testified that Officer Mullins told him he would be in "big trouble" if he did not sign the statement, so he signed it out of fear (Tr. 68-69). He also testified that no one read the rights statement to him. When asked why he signed the confession, he said, "I didn't think it was all that important" and "they told me that if I didn't I would be in big trouble, so I signed the paper, not understanding what it was" (Tr. 68).

On cross-examination, Paul M. testified that he was familiar with his mother's handwriting and the writing on the rights statement appeared to be her signature (Tr. 74). He also testified that he knew he was being interrogated in connection with a murder which he realized was a serious matter (Tr. 74-A). Paul M. confirmed he was only questioned by the police in his mother's presence (Tr. 75).

Mr. M.'s older brother then took the stand. He testified that May M. could not read or write (Tr. 80), that he

never knew Mr. M. could read or write because when mail was received he or someone else would have to read it, and Paul M.'s father also could not read or write (Tr. 80). He also testified that Paul M. had no experience with attorneys prior to the time of the interrogation (Tr. 82).

The court below suppressed the confession of Paul M. from the certification hearing. (See Oral Ruling of court, Appendix B.)

The State then called Officer Mullins back to the stand in order to lay a foundation for introduction of a "case card" from the case card file of the Oklahoma City Police Department, Juvenile Division. The case card was admitted (Tr. 101), demonstrating prior involvement with the juvenile court. It was noted before the card was admitted that Paul M.'s juvenile court records had been destroyed in the past and that the card represented the only proof of his juvenile record (Tr. 94-95).

Mr. M. then moved for judgment; and the court found that, from the evidence presented, the defendant would not have been certified as an adult (Tr. 106). The court stated that it had no choice but to issue the Writ of Habeas Corpus (Tr. 106); but stayed taking any action at that time in order to permit the State to decide what action to take in response to that decision.

On November 20, 1980, the State moved to reopen the cause for further evidentiary hearing because of the discovery of records from the Department of Mental Health of Oklahoma pertaining to Paul M.'s committment to Central State Hospital for a period of observation following his arrest in 1970. These records were available for inspection

prior to the evidentiary hearing of November 13, 1980, but counsel for the State noted that the Department of Mental Health was not consulted nor its records inspected prior to that evidentiary hearing because of the serious nature of the offense, the age of Paul M., statements made by him after his arrest, and the belief that this would be more than enough to find that a state court would have certified Paul M. to be tried as an adult had a certification hearing been held.

A hearing on the State's motion to reopen for further evidentiary hearings was held on March 11, 1981, before the Honorable H. Dale Cook, United States District Judge. The court overruled the State's motion to reopen.

On March 12, 1981, respondents filed a motion to stay execution of the Writ of Habeas Corpus, pursuant to Rule 23(c), F.R. App.P., 28 U.S.C.A. A hearing on this motion was held on March 25, 1981, before the Honorable H. Dale Cook, District Judge. The court overruled the motion to stay and contrary to the factual finding by the Court of Appeals below, *Crisp* v. [*M*], supra, 668 P.2d at 1131, the Writ of Habeas Corpus and Order of Release were executed on March 25, 1981. As of April 20, 1981, Paul M. was said to be in Houston, Texas, no longer under the custody of the State pursuant to the Oklahoma Judgment and Sentence on Plea of Guilty for the Murder of Willie Droke.

The Court of Appeals affirmed the District Court. The Court of Appeals found that under the circumstances of this case re-exhaustion of Paul M.'s state remedies was not required. The court also concurred with the District Court

that the oral and written statements of Paul M. could not be used to decide whether Paul M. would have been certified to stand trial as an adult. The State prays to this Court for relief from these judgments.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE OF THE INFERIOR FEDERAL COURTS TO REQUIRE PAUL M. TO EXHAUST AN AVAILABLE ADEQUATE STATE REMEDY THAT BECAME AVAILABLE AFTER THE INSTITUTION OF FEDERAL HABEAS CORPUS PROCEEDINGS IS A CONFLICT IN RESULT WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE EXHAUSTION REQUIREMENT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Paul M. brought this action in federal court for habeas corpus relief on September 10, 1975, having earlier the same year sought and been denied relief in the state courts on the basis of *Dean* v. *Crisp*, supra. Action on the merits of Paul M.'s petition was delayed for various reasons for about five (5) years. On February 14, 1979, in the case of *Edwards* v. *State*, supra, the Court of Criminal Appeals of Oklahoma partially overruled *Dean* v. *Crisp*, supra, and as a consequence Paul M. had an actionable claim under the State of Oklahoma's Post-Conviction Procedure Act, 22 O.S. 1971, § 1080, *et seq*. Paul M. never requested the federal court to abate its proceedings while he pursued this remedy, nor did he petition the appropriate state district court for relief on the basis of *Edwards* v. *State*, supra.

The State directly informed the District Court of the availability of the state remedy and Paul M.'s failure to pursue that remedy on September 18, 1979, and of the State's position that Paul M. must exhaust this remedy before the federal court took any action. This position was re-urged by the State on January 24, 1980. (See Appendix M.) The federal District Court did not order Paul M. to exhaust this new remedy. The federal District Court proceeded to set the matter for hearing that eventually was held on November 13, 1980, some twenty-two (22) months after the state remedy became available.

The Court of Appeals affirmed the District Court's decision not to require re-exhaustion, relying on *Roberts* v. *LaVallee*, 389 U.S. 40 (1967). The court acknowledged its own precedent of *Drennon* v. *Hess*, 642 F.2d 1204 (10th Cir. 1981), on the issue of re-exhaustion but distinguished it on the basis that it dealt with supervening changes in federal substantive law. 668 F.2d at 1138. It acknowledged cases such as *Case* v. *Nebraska*, 381 U.S. 336 (1965), and *James* v. *Copinger*, 428 F.2d 235 (4th Cir. 1970), but held these cases only require a federal court to require re-exhaustion when a supervening change in state procedural law occurs. *Id.* The Court of Appeals distinguished the case at bar with those where re-exhaustion was required, stating:

> "... First Oklahoma refused to recognize the constitutional violation for many years. Meanwhile the Attorney General, in effect, conceded that no action was to be expected from the Oklahoma courts and approved a hearing by the federal court. Further exhaustion was likely to prove futile. The Attorney General recognized this fact, as shown by his sug-

gesting that the federal court hear the issue." 668 F.2d at 1139.

The Court of Appeals misapplied *Roberts* v. *LaVallee*, supra. In *Roberts* the indigent petitioner had exhausted his state remedies in seeking a free transcript. Between the time the federal court took action and the time of the decision on the merits of the appeal, the state supreme court found that indigent state prisoners were entitled to a free transcript. The Court of Appeals reversed for re-exhaustion and this Court reversed the Court of Appeals, stating:

> ". . . Petitioner has already thoroughly exhausted his state remedies, as the Court of Appeals recognized. Still more state litigation would be both unnecessarily time-consuming and otherwise burdensome. This is not a case in which there is *any substantial state interest* in ruling once again on petitioner's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is *predetermined by established federal principles.*" (Emphasis added) 389 U.S. at 43.

There was a substantial state interest in the case at bar since decision of the ultimate issue required an application of state law to the facts of the case and ultimate relief was not "predetermined." *Edwards* v. *State*, supra, established as a procedural prerequisite for the statement of a substantial claim of unconstitutional sexual discrimination for which relief should be granted that a petitioner state to the state district court some valid reason to believe that the transfer to the adult trial division would have been denied. 591 P.2d at 321. Once a petitioner articulates such

a reason, the State then assumes the burden of proving that transfer to the adult trial division probably would have occurred. *Id.* "All" evidence bearing on that issue may be considered by the court concerning the nature of the offenses committed. *Id.*, at 322. By contrast the Court of Appeals' procedure does not require the petitioner to show some valid reason to believe jurisdiction would not have been transferred to the adult trial division and hearings are conducted as a *post hoc* transfer case. Inasmuch as Paul M. had admittedly participated in a brutal murder only one (1) month before he reached the age of eighteen (18), it is probable that Paul M. could not articulate such a reason within the Oklahoma procedure announced in *Edwards* and thereby cause the State to be put to its proof. Failure to articulate such a reason could have applied as failure to satisfy a valid state procedural rule. *Cf., Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murch* v. *Mottram*, supra. Consequently, there was a substantial state interest in the relitigation of the claim in the state courts.

The record shows that Paul M. turned eighteen (18) years old five (5) days after he was returned from California to Oklahoma to answer to the murder charge. Consistent with Paul M.'s sex discrimination theory, the Oklahoma juvenile justice system became legally barred from exercising *any* supervisory control over Paul M. once he became eighteen years old. Compare, 10 O.S. Supp. 1970, § 1101(a), to 10 O.S. Supp. 1968, §§ 1102, 1116, 1138 and 1139 (showing as valid a claim against supervision by juvenile justice authorities after a male person reached eighteen (18) years of age as Paul M. had against the manner in which the adult trial division acquired jurisdiction over

him to entertain his plea to the "adult" charge and sentence him in accordance with that plea). The legal impotence of the juvenile system to provide *any* supervision to Paul M. in response to his participation in the murder of Willie Drokе lends further support to the State's position that Paul M. could not articulate a substantial claim under the *Edwards* v. *State*, supra, procedure of sexual discrimination regarding the manner in which the adult trial division acquired jurisdiction over his case.

This Court this term has re-examined the principles upon which the requirement of exhaustion was premised. *Rose* v. *Lundy*, ___ U.S. ___, No. 80-846 (March 3, 1982). The reasons given by the Court of Appeals for affirming the denial of re-exhaustion, encapsulated in the quote above, are inconsistent with the principles upon which the exhaustion requirement was based. Although this Court has not passed upon the issue, and the Court of Appeals below was careful to preserve its silence upon the subject, 668 F.2d at 1138, many federal courts have held that the exhaustion requirement is so important it cannot be waived. *United States ex rel. Trantino* v. *Hatrock*, 563 F.2d 86 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978); *United States ex rel. Sostre* v. *Festa*, 513 F.2d 1313 (2d Cir. 1974), *cert. denied*, 423 U.S. 841 (1975); *Needel* v. *Scafati*, 412 F.2d 761 (1st Cir. 1969), *cert. denied*, 396 U.S. 861. See *Sweet* v. *Cupp*, 640 F.2d 233 (9th Cir. 1981). See generally *Davis* v. *Campbell*, 608 F.2d 317 (8th Cir. 1979); *United States ex rel. Lockett* v. *Illinois Pardon and Parole Board*, 600 F.2d 116 (7th Cir. 1979); *Blackwell* v. *Wolff*, 454 F.2d 48 (8th Cir. 1972). But see *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978); *Jenkins* v. *Fitzberger*, 440 F.2d 1188 (4th Cir. 1971).

Thus, there appears to be an effective conflict between the decision of the Court of Appeals in the case below and the decision of Courts of Appeals of other Circuits on the question of whether the exhaustion requirement can be waived or an estoppel applied.

It is difficult to fathom why the District Court apparently ignored the fact that Paul M. had an available state remedy for more than a year after the state carefully informed the court of the availability of the remedy and the State's position that Paul M. should exhaust the remedy. The State had no means of invoking the state court's jurisdiction in the interim, a matter apparently conceded by the Court of Appeals below. *Crisp* v. [*M*], supra, at 1133 and n. 2.

The Court of Appeals' statement that further exhaustion by Paul M. was likely to prove futile is likewise puzzling. The state court had promptly originally entertained the issue on its merits despite the availability of an adequate state procedural bar to the claim. Compare 22 O.S. 1971, § 1086, and *Murch* v. *Mottram*, supra. The Court of Criminal Appeals had overruled the case that stood as a bar to Paul M.'s case, thus clearing the way to a litigation of a meritorious claim in the state court. The fact that nearly two (2) years passed between the time the Oklahoma courts recognized Paul M.'s claim and the time the federal court eventually granted him release appears to have been overlooked by the Court of Appeals in its haste to chastize the Oklahoma courts. Under the circumstances of this case, re-exhaustion in the state courts would not have caused an unnecessary delay in considering the merits of his case and should have been required.

The departure of the federal District Court below from the usual course of judicial proceedings in reference to the exhaustion requirement, which was sanctioned by the decision of the Court of Appeals, calls for an exercise of this Court's power of supervision and the writ should be granted to examine whether re-exhaustion should be required.

II.

THE INFERIOR FEDERAL COURTS' FINDING THAT THE STATEMENTS OF PAUL M. SHOULD BE BARRED FROM EVIDENCE ON THE BASIS THAT PAUL M. HAD NOT BEEN GIVEN MEANINGFUL WARNING OF HIS RIGHT TO REMAIN SILENT ARE CONTRARY TO LAW AND UNSUPPORTED BY THE RECORD AND THEREFORE APPROPRIATE FOR REVIEW BY THIS COURT AS AN EXERCISE OF ITS SUPERVISORY POWERS OVER INFERIOR FEDERAL COURTS.

Paul M. and his mother, May M., were read the warnings prescribed by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See Appendix B and Appendix E. The circumstances of the waiver are summaried at pp. ____ of this petition. The District Court apparently held on the basis of certain incredible testimony that the warnings had no real meaning to either Paul M. or May M. and excluded the subsequent statement from evidence. The Court of Appeals affirmed this finding. The lower courts' decisions are in conflict with the purpose of the exclusionary rule and the reasoning for prescribing the *Miranda* warnings. This Court should review this matter as an exercise of this Court's supervisory jurisdiction.

III.

A STATEMENT VOLUNTARILY MADE TO THE POLICE SHOULD BE ADMISSIBLE AT HEARING CONCERNING WHETHER JURISDICTION OF THE JUVENILE DIVISION OF THE STATE DISTRICT COURT SHOULD BE TRANSFERRED TO THE ADULT TRIAL DIVISION.

The Court of Appeals relied upon *In re Gault*, 387 U.S. 1 (1967), and *J.T.P.* v. *State*, 544 P.2d 1270 (Okl.Cr. 1975), to affirm the federal District Court's exclusion of Paul M.'s voluntary statements from the State's case. The decision in *J.T.P.* v. *State*, supra, clearly turned upon the federal question and also relied upon *Gault*, supra.

The Court of Appeals and Court of Criminal Appeals have misapplied *Gault* to transfer proceedings since the matter before this Court in *Gault* was the adjudicatory hearing concerning the juvenile's delinquency rather than the appropriateness of entertaining a voluntary confession in a transfer proceeding in which *guilt* cannot be adjudicated, *Breed* v. *Jones*, 421 U.S. 519 (1975), but in which the sole issue is whether the accused shall come within the power of the juvenile division of the state trial court or stand trial as an adult.

This Court has not addressed the issue of whether a voluntary confession is inadmissible in a juvenile transfer proceeding. In *Kent* v. *United States*, 383 U.S. 541 (1966), this Court found that transfer proceedings were of such "critical importance" that an arbitrary decision to transfer would violate due process. This Court stated in *Kent* that there was no need for a transfer hearing to "conform with all the requirements of a criminal trial or even the usual administrative hearing," but only that the hearing must

"measure up" to the essentials of due process and fair treatment. *Id.*, at 562. In *Breed* v. *Jones*, supra, this Court stated:

> ". . . [T]*he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court.* We require only that, whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings." (Footnote omitted, Emphasis added) 421 U.S. at 537-38.

This Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), explained the purposes for the exclusionary rule: to deter unlawful police conduct and protect the courts from reliance on untrustworthy evidence. This Court, quoting in *Michigan* v. *Tucker*, from *United States* v. *Calandra*, 414 U.S. 338 (1974), affirmed that "[t]he rule is calculated to prevent, not repair." 417 U.S. at 446. In *Tucker* this Court noted that where there has been genuine compulsion of testimony the exclusionary rule has been given broad scope. *Id.*, at 440. Where the right against compulsory incrimination has been extended beyond the scope of the proceedings at which culpability is determined, the underlying concern is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. *Id.*, at 440-41. This Court noted that prior to *Miranda* v. *Arizona*, supra, the principal issue was not whether a defendant had *waived* his privilege against self-

incrimination, but "simply" whether his statement was voluntary. *Id.*, at 441. This Court concluded in *Tucker* that even though the defendant had made a statement to the police without adequate warnings being given regarding his right to remain silent, information obtained from that statement could be used to obtain other evidence that could be used against him at trial.

Other courts have permitted the use of voluntary, but uncounselled, statements in proceedings where the issue of guilt vs. innocence is not involved. Such a statement may be used by a state in obtaining extradition of a person from another jurisdiction. *United States* v. *Flood*, 374 F.2d 554 (2d Cir. 1967). The exclusionary rule is held inapplicable to proceedings for revocation of parole. *United States* v. *MacKenzie*, 601 F.2d 221 (5th Cir. 1979); *United States* v. *Frederickson*, 581 F.2d 711 (8th Cir. 1978) (and cases cited therein, *Id.*, at 713); *Commonwealth* v. *Kates*, 452 Pa. 102, 305 A.2d 701 (1973). See also *Wilson* v. *State*, 621 P.2d 1173 (Okl.Cr. 1980) (holding that a person has no Fifth Amendment privilege against self-incrimination in a proceeding for revocation of parole or probation).

In *United States* v. *Calandra*, supra, the question was whether a person could refuse to answer questions posed by a Grand Jury on the ground that the questions were the fruit of information obtained by way of an unlawful search and seizure. This Court noted that a Grand Jury is not an adversary hearing at which guilt or innocence of the accused is adjudicated. 414 U.S. at 343. The Court also observed that society has an "important interest" in a thorough and extensive investigation. *Id.*, at 344. In noting the primary purpose of the exclusionary rule to be to deter

future police misconduct, rather than serve as a redress to the injury of the defendant, the Court concluded that misconduct would in no substantial way be less deterred by the fact that the Grand Jury may use the evidence to question the defendant since the evidence cannot be used at the trial to prove the State's case. *Id.*, at 351-52. Compare Policy Memorandum of United States District Court for the District of Columbia, appended to the *Kent* decision, where the prosecutive merit consideration in a juvenile transfer proceeding was determined by "whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney)." 383 U.S. at 567.

This Court has yet to pass on this important question of federal constitutional law. The public at large has an important interest in the thorough and extensive investigation addressed to the question of whether a person should be held accountable for crimes as an adult or be supervised through the juvenile rehabilitation process. A voluntary statement of the accused may provide useful facts to the court in making that important decision.

IV.

A STATEMENT VOLUNTARILY MADE TO THE POLICE SHOULD BE ADMISSIBLE AT A HEARING HELD SOME TEN (10) YEARS AFTER PAUL M. PLED GUILTY TO THE CRIME OF MURDER WHEN THE SOLE ISSUE BEFORE THE COURT IS WHETHER JURISDICTION OF THE JUVENILE DIVISION WOULD HAVE BEEN TRANSFERRED TO THE ADULT TRIAL DIVISION.

The issue of guilt (delinquency) was not before the District Court in this *post hoc* transfer proceeding. A decision on the merits would not incriminate Mr. M.; he incriminated himself long ago when he voluntarily and knowingly entered his counselled plea of guilty to the charge of murder. *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

The "primary purpose" of the exclusionary rule is to deter illegal police conduct, *Michigan* v. *Tucker*, supra. Police conduct would not significantly be affected by permitting such evidence at a transfer proceeding. The police made a good faith attempt to explain to Mr. M. his constitutional rights — the only finding in this case is that *subjectively* he and his mother were incapable of understanding the advice as read by the officer. See, *Id.*, 417 U.S. at 447 (where this Court stated that where officials proceeded in complete good faith the deterrence rationale loses much of its force). The deterrence of such official conduct will not significantly be lessened if this Court permits voluntary statements to be admitted in *post hoc* transfer proceedings since ordinarily such evidence could have been attacked before a decision was reached on the guilt (delinquency) issue, *Id.*, and because it was available evi-

dence that had withstood the passage of time, the destruction of records and the fading of memories. Furthermore, it appears that it would have been admissible in an Oklahoma proceeding. *Edwards* v. *State*, supra, 591 P.2d at 322.

Balanced with the foregoing considerations is the "strong interest" in making available to the fact finder "all" relevant and trustworthy evidence which either party seeks to introduce. *Michigan* v. *Tucker*, supra, 417 U.S. at 450. Also see *Edwards* v. *State*, supra, 591 P.2d at 322 ("all" evidence may be considered by the court on the *post hoc* transfer decision). The testimony Officer Mullins was prepared to relate would have been subject to the safeguards of cross-examination and probable rebuttal testimony by Paul M. The statements given by Paul M. were certainly relevant to determining whether, in fact, an Oklahoma juvenile trial division judge would have concluded that a person who had numerous prior contacts with the law; who admitted participation in a cruel, heinous murder; who was only one month away from his eighteenth (18th) birthday when he participated in that crime; and who was legally emancipated from the control of juvenile authorities after his eighteenth (18th) birthday should be retained under the supervision of the juvenile division or whether jurisdiction should be transferred to the adult trial division. The State submits that there is *no reasonable doubt* that presented such evidence an Oklahoma District Court would have transferred jurisdiction over Paul M. to the adult trial division.

The statutory infirmity Paul M. relied upon to obtain his release existed from 1941 through April 4, 1972, when the Legislature replaced the statute with a new provision.

Dean v. *Crisp*, supra, 536 P.2d at 965. Similar cases will be litigated on the basis of available surviving evidence. A voluntary statement made shortly after the crime occurred may be among the only evidence the court will have to weigh applicable criteria for the transfer decisions. *Edwards* v. *State*, supra, 591 P.2d at 320 and n.14.

The instant issue is one of substantial importance that has never been decided by this Court. The writ should issue to decide this question.

Respectfully submitted,

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May, 1982